No. [redacted]

(1)

D.C. No. CV-99-03082-CW

IN THE

SUPREME COURT OF THE UNITED STATES

HAROLD J. RUCKER - PETITIONER
(Your Name)

vs.

JOHN E. POTTER, Postmaster General of the U.S. Postal Service; et al., - RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

HAROLD J. RUCKER
(Your Name)

419 Darien Avenue
(Address)

Oakland, CA 94603-2121
(City, State, Zip Code)

(510) 632-7727
(Phone Number)

33 pp

LIST OF PARTIES

PLAINTIFF:

Harold J. Rucker

DEFENDANTS:

John E. Potter, Postmaster General of the Postal Service,
William August, Postmaster of Alameda Post Office, Alameda, CA.
Warren Spencer, Supervisor at Alameda Post Office, Alameda, CA.
Laverne Pennix, Supervisor at Alameda Post Office, Alameda, CA.

STION(S) PRESENTED

1. Whether there is an alignment of the Circuit and District Courts as to how to define and classify continuing violations involving systematic discrimination that is comprised of formal and informal policies practiced by an employer to select employees for harassment or dismissal for participating in the EEOC complaint process?

2. Whether there are guidelines to align the Circuit and District Courts as to how to identify if systematic discrimination is being used by an employer to customize the workforce based upon disriminatory criteria that focuses on specific behaviour characteristics of a specific racial group and exploitive gender criteria which adversely impacts individuals of specific racial groups who are less exploitable?

3. Whether the District Court is justified in using the criteria of filing a specific number of discrimination complaints against an employer as criteria for ordering a restrictive pre-filing order against the appellant without first considering factors concerning the effectiveness of the EEOC administrative process in resolving EEO complaints at the onset and without determining if the series of complaints filed constitute sufficient evidence of continuing violations of systematic discrimination practiced by the employer?

4. Whether the Circuit and District Courts have a responsibility or duty to allow complainants the opportunity of meaningful and comprehensive discovery into their allegations of discrimination before dismissing their complaints after the Courts are apprised of the EEOC adminstrative process being compromised and/or rendered ineffective by the systematic failure of personnel of the EEOC administrative process to develop a comprehensive and complete record of the alleged discrimination by failing to interview witnesses for supporting affidavits and being informed that management used tactics to create a hostile work environment to intimidate employees thereby causing fear of repriasal from management if they provided supportive declarations of discrimination claims to fellow employees?

5. Whether the District Court was justified in dismissing a discrimination complaint without providing the complainant with an opportunity to conduct meaningful discovery where the primary theory of discrimination is depended upon evidence from the employer to demonstrate motive and intent?

6. Whether the District Court was justified in dismissing the retaliation claim when the discriminatory actions alleged demonstrate a cognizant pattern of disparate treatment used in conjunction with employment practices and policies that appeared neutral on their face.

TABLE OF AUTHORITIES CITED

CASES — PAGE NUMBER

Harris v Forklift Systems, Inc., 510 U.S. 17, 126 L.Ed 2d 295 4

O' Connor v Consoolidatd Coin Caretakers Corp. (1996, US) 134 L Ed 2d 4 4

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☒ For cases from **federal courts:**

The opinion of the United States court of appeals appears at Appendix "A" to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
☒ is unpublished.

The opinion of the United States district court appears at Appendix "B" to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
☒ is unpublished.

[ ] For cases from **state courts:**

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

☒ For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was February 21, 2002

☒ No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(l).

[ ] For cases from **state courts:**

The date on which the highest state court decided my case was _____
A copy of that decision appears at Appendix _____

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq.

S EMENT OF THE CASE

This is a case that involves a series of disparate treatment used in conjunction with employment practices and policies to eliminate specific individuals from the workforce that fail to meet employment criteria based upon specific behaviour characteristics of a specific racial group. Employees that did not conform to the employer's established racial based criteria was systematically harassed under seemingly neutral employment practices and policies until such time that an event could be developed or orchestrated through prefabrication to dismiss the employee. O' Donnell v Heublein, Inc. (1990, ND Ill) 1990 U.S. Dist. Lexis 1263; Bruno v Western Elect. Co (1987, CA10 Colo) 829 F2d 957.

Members of management would purposely create a hostile work environment by providing incorrect and erroneous information on how to address injury claims. Management would provide negative correspondence to doctors or injury claim representatives without the claimant's knowledge or an opportunity to respond to the correspondence. Management would use disciplinary actions against the appellant without probable cause i.e. issuance of letters of warning for actions caused by managements misinformation. Management would provide erroneous information to the appellant as to how to address significant medical matters which required work restrictions. Subsequent to the appellant discovery of the true information as to how to address his medical conditions with specific medical work restrictions, management stated it will not honor the appellant's doctor's medical work restrictions. Appellant contends that management used retaliation as means of kurtailing and controlling the use of the EEOC complaint process by using unfounded acts of discipline to harass, aggravate and create a hostile work environment.

The discriminatory employment practices and policies used by management served to create a workforce of individuals of a specific racial makeup which served to eliminate the appellant for not being a member of that racial group. Appellant contends that he has been subjected to five continuous years of periodic disparate treatment since his first filing of an EEOC Complaint in 1991 until his termination in 1996. A complaint was filed for each incident of disparate treatment. Each incident was found not to be pervasive or abusive enough in and of itself to be actionable discrimination. Harris v Forklift Systems, Inc., 510 U.S. 17, 126 L.Ed 2d 295.

EST AVAILABLE COPY

STATEMENT OF THE CASE

Collectively the incidents demonstrate a designed systematic pattern of discrimination used to eliminate specific employees from the workforce for not meeting the racial profile criteria. Berry v Board of Supervisors of Louisiana State University (1986, CA5 La) 783 F2d 1270.

Appellant contends that the EEOC complaint process was consistently rendered ineffective by the lack of development of a thorough and complete record through the EEOC administrative process. Appellant also contends that collaborative declarations as to workplace discrimination was hampered by management's retaliatory policy. Appellant was not cognizant of the clandestine motive of the employer during the time that he filed his first two discriminations complaints, however after the third incident a systematic pattern began to emerge, but a motive was not determined. Elliott v Sperry Rand Corp. (1978, D.C. Minn) 79 FRD 580) The individual events of disparate treatment considered singlely was insufficient for the appellant to become aware there was an underlying motive of the employer for their disparate treatment. Crittendon v American Nat. Ins. Co., 967 F. Supp 933 (S.D. Tex 1997)

Appellant did not become aware of the motive and intent of the employer until such time that he had filed his last dicrimination complaint and discovered the motive of the pattern of disparate treatment by his ex-employer. Shehadeh v Chesapeake & Potomac Tel. Co. (1978) 193 App D.C. 326.

REASO' FOR GRANTING THE PETITION

This petition should be granted because there is insufficient decisions that guides the District Courts or the United States Courts of Appeal in recognizing and the usage of discriminatory employment practices and policies to custom design a workforce using racial criteria that favors one group of citizens over the other because of specific characteristic traits. Racial profiling in the workplace is designed to eliminate a particular groups of individuals for what appears to be work related reasons on the surface. A favoritism for one racial group of individuals over another racial group violates the very core of the Civil Rights laws. This employment practice

This petition should be granted to bring to the attention of the District Courts and the Court of Appeals the subtle factors of racial profiling in the workplace which may not manifest themselves in a single incident of alleged discrimination but should be considered over a reasonable period of time of continuous incidents of alleged discrimination. Reported incidents of discrimination should be addressed as if there is a valid reason for being reported until an complete investigation into the allegation proves otherwise.

This petition should be granted because government employees have a very limited avenue to address discrimination in the work place. In this instance the avenue to address discrimination in the work place is being compromise and rendered ineffective by the incomplete and inefficient investigative body of the EEOC administrative process. The lack of an immediate and effective administrative avenue to investigate and resolve acts of dicriminatory actions creates undue stress upon government employees and subsequently leads to abuse of the workforce by management personnel which eventually leads to numerous complaints of discrimination being filed in the court system. This Court should mandate the lower courts to address with urgency any valid allegations of the failure of the EEOC administrative process to provide a sufficient record of discrimination claims.

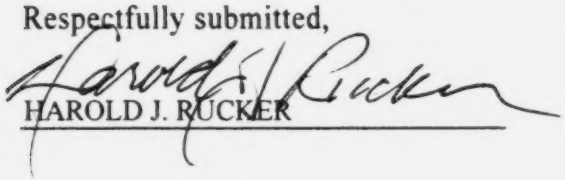
This petition should be granted because the lower courts failed to consider the factors involved in continuous violations of discrimination and failed to provide the appellant with the opportunity to define the motive and intent of the employer's discriminatory practice.

This petition should be granted because the lower court failed to corrolate the retalitory activities of the employer with the alleged acts of discrimination that serve to harass and intimidate members of the workforce to prevent their participation in the EEOC investigative process.

CONCLUSION

The petition for a writ of certiorari should be granted

Respectfully submitted,



HAROLD J. RUCKER

Date: May 20, 2002

APPENDIX A

FILED

FEB 2 1 2002

CATHY A. CATTERSON
CLERK, U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HAROLD J. RUCKER, Plaintiff - Appellant, v. JOHN E. POTTER,* Postmaster General, Postmaster General of the U.S. Postal Service; et al., Defendants - Appellees.	No. 01-16052 D.C. No. CV-99-03082-CW MEMORANDUM**

Appeal from the United States District Court
for the Northern District of California
Claudia Wilken, District Judge, Presiding

Submitted February 11, 2002***

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* John E. Potter is substituted for William J. Henderson, as Postmaster General of the United States Postal Service, pursuant to Fed. R. App. P. 43(c)(2).

** This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

*** Because the panel unanimously finds this case suitable for decision without oral argument, Rucker's request for oral argument is denied. *See* Fed. R. App. P. 34(a)(2).

Before: B. FLETCHER, T.G. NELSON, and TALLMAN, Circuit Judges.

Harold J. Rucker appeals pro se the district court's dismissal of his Title VII claim alleging race, color and gender discrimination in addition to retaliation. We review de novo a dismissal for failure to state a claim, *Kimes v. Stone*, 84 F.3d 1121, 1126 (9th Cir. 1996), and we affirm.

The district court properly dismissed Rucker's amended complaint because it failed to state a prima facie claim for discrimination due to race or gender, *see Breneman v. Kennecott Corp.*, 799 F.2d 470, 474 (9th Cir. 1986), or for retaliation pursuant to 42 U.S.C. § 2000e-3, *see Hashimoto v. Dalton,* 118 F.3d 671, 679 (9th Cir. 1997).

Rucker's remaining contentions lack merit.

AFFIRMED.

APPENDIX B

United States District Court
For the Northern District of California

FILED

MAR 27 2001

RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

HAROLD J. RUCKER,

Plaintiff,

v.

WILLIAM J. HENDERSON, United States Postmaster General,

Defendant.
/

No. C 99-3082 CW

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS AND DENYING PLAINTIFF'S RULE 56(f) REQUEST

Defendant William J. Henderson, United States Postmaster General, moves to dismiss or for summary judgment. Plaintiff Harold J. Rucker, proceeding pro se, opposes the motion. Having considered all of the papers filed by the parties, the Court GRANTS Defendant's motion to dismiss and DENIES Plaintiff's Rule 56(f) request for additional discovery.

PROCEDURAL BACKGROUND

This is the fifth complaint Plaintiff has filed against Defendant arising out of his employment with the United States

Postal Service (USPS).[1] In this complaint, filed on June 26, 1999, Plaintiff alleges gender discrimination, race discrimination, age discrimination, and retaliation, pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et. seq., the Rehabilitation Act, 29 U.S.C. §§ 791 and 794, and the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 et. seq.

On October 4, 1999, Defendant filed a motion to dismiss this complaint and case no. C 99-3107 CW on grounds of res judicata and collateral estoppel, to stay discovery, and to restrict Plaintiff from filing further claims against Defendant, the USPS, or any USPS employee. In an order issued on April 26, 2000 (April Order), the Court dismissed Plaintiff's age discrimination and failure to accommodate claims on the basis of res judicata. The Court dismissed Plaintiff's race and gender discrimination claims, not on the basis of res judicata or collateral estoppel, but because Plaintiff failed to allege facts that "suggested a nexus between his supervisors' responses to his disability complaints and his gender or race." April Order at 12:7-9. The Court dismissed Plaintiff's retaliation claim because it was not possible to ascertain from the complaint the activities that formed the basis of Defendant's retaliation. See id. at 17-18. The Court granted Plaintiff leave to amend his race and gender discrimination claims that had been the subject of complaints he had filed with the Equal Employment Opportunity Commission (EEOC) on November 14, 1995, and

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[1]This complaint was originally filed as two complaints. The second complaint, case number C 99-3107 CW, was dismissed as duplicative.

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For the Northern District of California

May 17, 1996 "to allege with particularity a factual connection between the actions of his supervisors and his gender or race, if he truthfully can make such allegations." Id. at 12:17-22. The Court also granted Plaintiff leave to amend his retaliation claim to "specifically identify the opposition or enforcement activities that form the basis for the alleged retaliation against him, and identify with particularity the timing and nature of the allegedly retaliatory acts taken against him as a result of those activities." Id. at 18:15-21. The Court indicated to Plaintiff that if he failed to allege the necessary factual basis to support his claims of employment discrimination and retaliation, his amended claims would be subject to dismissal with prejudice. The Court further granted Defendant's motion to stay discovery pending a motion to dismiss the amended complaint, and to restrict Plaintiff from filing further actions against Defendant without first obtaining leave of the Court.

On May 22, 2000, Plaintiff filed his first amended complaint (FAC). On August 7, 2000, Defendant filed the instant motion to dismiss Plaintiff's FAC or for summary judgment based upon evidence contained in the record of Plaintiff's two EEOC cases.

RELEVANT FACTUAL BACKGROUND

Plaintiff is an African-American male. On May 14, 1991, Plaintiff began to work for the USPS as a letter carrier in the city of Alameda, California.

The following facts are as alleged in Plaintiff's complaint and being taken as true for the purposes of Defendant's motion to dismiss. On September 22, 1992, Plaintiff filed a complaint with

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the Equal Employment Opportunity Commission (EEOC) (1992 EEO complaint), Office of Federal Operations (OFO) against his supervisor Carolyn Seaberry for allegedly calling him a "dumb ass man," and for creating an unacceptable and intolerable work environment. See FAC ¶¶ 34 and 154. On June 22, 1995, the OFO remanded the complaint back to the USPS for processing. See id. ¶ 34. On July 24, 1995, William W. Norris, USPS Acting Appeals Review Examiner/Analyst in San Bruno, California issued a "Remand Acceptance Letter" addressed to Plaintiff, indicating that Plaintiff's discrimination complaint was accepted by the USPS for investigation. See id. ¶¶ 35 and 157, Pl.'s Ex. B. Plaintiff claims that this action on his 1992 EEO complaint is what precipitated the retaliation taken against him. Plaintiff alleges that the individuals who retaliated against him knew of the OFO remand letter because USPS Postmasters and supervisory personal recognize by name or face the EEOC investigators who are members of the permanent staff. See id. ¶ 169. Even if the Postmaster or supervisory personnel do not recognize the EEOC investigator, the EEOC investigator must identify him or herself to USPS management and must also identify the nature of his or her investigation and who he or she is there to interview. See id. ¶ 170.

In 1993, Plaintiff filed a second EEO complaint, which stemmed from Defendant's failure to hire Plaintiff for a GS-9 electronic technician position (1993 EEO complaint). See id. ¶ 160. The EEOC issued a right to sue letter, and on December 15, 1994, Plaintiff filed case number C 94-4299 CW, one of his earlier suits in this Court. See id. ¶ 174. Plaintiff claims that this complaint is

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also part of the reason for the alleged retaliation against him.

In November, 1994, Plaintiff began experiencing pain in his neck and shoulders. See id. ¶ 12. On January 13, 1995, Plaintiff was seen by Dr. Hussam El-Gohary, a physiatrist at the Readicare Medical Center, USPS' contracted medical facility, who became Plaintiff's treating physician. See id. ¶¶ 17, 21, 38. Dr. El-Gohary prescribed therapy and recommended modified work. See id. ¶¶ 22 and 23. Plaintiff was assigned to sort undeliverable bulk mail and could take breaks as necessary to avoid the onset of muscle tension. See id. ¶ 23. Plaintiff could not continue to sort undeliverable bulk mail because the inhalation of dust while sorting caused him to have an allergic reaction. See id. ¶ 24. He also continued to have pain in his neck and shoulders. See id. ¶ 25. On May 2, 1995 Plaintiff was seen by Dr. Robert Ansel, a neurologist, upon referral from Dr. El-Gohary. See id. ¶ 26.

On June 28, 1995, Plaintiff was seen by Dr. Allan Halden, an orthopedic surgeon. See id. ¶ 36. Dr. Halden's medical findings were, in part: "The claimant's physical limitations resulting from work related disability consist mainly of an inability to tolerate jobs of a repetitive nature with the same motions being done over and over again for hours at a time. This includes repetitive motions of the neck, arms and shoulders such as casing or other sorting of mail or prolonged reading as he presently is doing reading postal manuals." Id. ¶ 37.

On July 21, 1995, Plaintiff was informed that Dr. El-Gohary had issued a report in which he released Plaintiff to return to his full mail sorting duties. See id. ¶ 39. Unknown to Plaintiff,

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Supervisor Warren Spencer and Postmaster William August had discussed Plaintiff's medical condition with Dr. El-Gohary and they had influenced Dr. El-Gohary to place Plaintiff back on full duty. See id. ¶ 39. Plaintiff was assigned to regular work duties, but Plaintiff experienced the same symptoms and told Supervisor Spencer that he could not continue working due to the pain. See id. ¶ 40. Supervisor Spencer told Plaintiff that he was cleared by his treating physician to engage in his normal work activities and he would have to obtain medical verification from his treating physician for work restrictions. See id. ¶ 41. That same day, Plaintiff saw Dr. El-Gohary, who referred Plaintiff for an MRI examination, but who continued to indicate that Plaintiff could work at full duty with no restrictions. See id. ¶ 43. When Plaintiff returned to his job site, Supervisor Spencer sent Plaintiff home and told him not to return to work until he provided medical documentation regarding his restrictions. See id. ¶ 46.

On August 26, 1995, Plaintiff received a certified letter from Supervisor Spencer in which Spencer stated that Plaintiff was absent without leave (AWOL) and would be removed from the postal service if he did not provide satisfactory information regarding his absence. See id. ¶ 59. On August 28, 1995, Plaintiff returned to work. See id. ¶ 60. Supervisor Spencer was on vacation. See id. ¶ 60. Plaintiff was assigned to his regular duty of casing mail. See id. ¶ 62. Plaintiff attempted to explain his medical situation to Postmaster August, but Postmaster August refused to listen, stated that Plaintiff's doctor had cleared him for full duty and ordered Plaintiff to go back to work. See id. ¶ 61.

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Postmaster August watched Plaintiff as he worked. See id. ¶ 62.

On August 30, 1995, Plaintiff experienced severe muscle spasms that caused him to take an unscheduled break. Supervisor Munoz ordered Plaintiff to return to casing mail. When Plaintiff told him that he could not continue working, Supervisor Munoz insisted Plaintiff take sick leave, which Plaintiff did. See id. ¶ 66. On September 8, Plaintiff submitted a written request to Postmaster August to be assigned to restricted duty. Postmaster August denied this request. See id. ¶ 67. On September 15, 1999, Plaintiff told Supervisor Spencer that he could not do his job due to the pain in his back and shoulders. See id. ¶¶ 78 and 79.

On October 4, 1995, Plaintiff was examined by Dr. Wesley Watkins, who diagnosed Plaintiff with a left trapezial strain. See id. ¶ 104, Pl. Ex. N. On a work status report, Dr. Watkins recommended that from October 4, 1995 to October 10, 1995, Plaintiff could participate in modified work with certain restrictions. See id. On the work status report, Dr. Watkins indicated Plaintiff was to see him for follow-up care on October 10, 1995. See id. On October 12, 1995, Supervisor Lavern Pennix told Plaintiff that the documentation from Dr. Watkins was not acceptable and that his order for restricted work duty would not be honored. See id. ¶ 106.

LEGAL STANDARD

A motion to dismiss for failure to state a claim will be denied unless it appears that the plaintiff can prove no set of facts which would entitle it to relief. Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Fidelity Fin. Corp. v. Federal Home Loan Bank of

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San Francisco, 792 F.2d 1432, 1435 (9th Cir. 1986), cert. denied, 479 U.S. 1064 (1987). All material allegations in the complaint will be taken as true and construed in the light most favorable to the plaintiff. NL Indus., Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986). Although the court is generally confined to consideration of the allegations in the pleadings, when the complaint is accompanied by attached documents, such documents are deemed part of the complaint and may be considered in evaluating the merits of a Rule 12(b)(6) motion. Durning v. First Boston Corp., 815 F.2d 1265, 1267 (9th Cir. 1987), cert. denied, 484 U.S. 944 (1987).

Dismissal of a complaint can be based on either the lack of a cognizable legal theory or the lack of sufficient facts alleged under a cognizable legal theory. Balistreri v. Pacifica Police Dept., 901 F.2d 696, 699 (9th Cir. 1988).

A complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a). "Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required." Fed. R. Civ. P. 8(e). These rules "do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds on which it rests." Conley, 355 U.S. at 47. However, "conclusory allegations without more are insufficient to defeat a motion to dismiss." McGlinchy v. Shell Chemical Co., 845 F.2d 802, 810 (9th Cir. 1988);

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Smilecare Dental Group v. Delta Dental Plan, 88 F.3d 780, 785 n.6 (9th Cir. 1996); Rutman Wine Co. v. E. & J. Gallo Winery, 829 F.2d 729, 735-36 (9th Cir. 1987).

Pleadings submitted by pro se litigants are held to a less rigid standard than those drafted by attorneys. Haines v. Kerner, 404 U.S. 519, 520 (1972). Even pro se pleadings, however, "must meet some minimum threshold in providing a defendant with notice of what it is that it allegedly did wrong." Brazil v. United States Dep't of Navy, 66 F.3d 193, 199 (9th Cir. 1995).

DISCUSSION

I. Exhausted Claims

In a footnote, Defendant argues that because Plaintiff did not raise a gender claim in the complaints with the EEOC upon which this lawsuit is based, he is estopped from raising that claim.

Federal employees must exhaust administrative remedies for employment discrimination claims before filing suit in federal court. See Boyd v. United States Postal Serv., 752 F.2d 410, 412 (9th Cir. 1985) (citing Brown v. General Servs. Admin., 425 U.S. 820, 832 (1976)).

As noted in the April Order, Plaintiff filed two EEOC complaints on November 14, 1995 and on May 17, 1996 for which he received right to sue letters. Only the claims which Plaintiff has exhausted in these complaints can be considered by this Court.

In the November 14, 1995 EEOC complaint (1995 EEOC complaint), Plaintiff checked the boxes to allege discrimination based on race, color, gender and retaliation. On the complaint form, Plaintiff indicated that the discriminatory acts took place on July 21, 1995,

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July 26, 1995, August 28, 1995, September 12, 1995 and September 14, 1995. Plaintiff alleged that the following actions constituted discriminatory conduct: (1) Supervisor Spencer wrongly marked Plaintiff's absences from work as AWOL; (2) Postmaster August influenced Dr. El-Gohary's medical opinion by disseminating derogatory information concerning Plaintiff's medical history[2]; (3) Postmaster August ordered Plaintiff to continue to case mail when Plaintiff attempted to convey to him the medical problem he was experiencing; (4) Postmaster August and Supervisor Spencer told Plaintiff that his doctor said he was fit for duty, even when Plaintiff attempted to tell them he was having difficulty casing mail; and (5) Supervisor Spencer provided Plaintiff with incorrect information regarding the procedure for obtaining alternate medical assistance.[3] As the basis of his retaliation claim, Plaintiff stated that on June 22, 1995, his 1992 complaint was remanded back to the USPS and that the "unfounded treatment that I am now enduring are [sic] aligned with that of the prior EEO activity."

In the May 17, 1996 EEOC complaint (1996 EEOC complaint), Plaintiff checked the boxes to allege discrimination based on race, color, age and retaliation which took place on October 12, 1995. In his request for EEOC counseling, Plaintiff indicated he was alleging discrimination on all the aforementioned bases and included discrimination based on sex. Plaintiff alleged discriminatory conduct on the part of Supervisor Pennix who told

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[2]This allegation was not investigated by the EEOC.

[3]This allegation was not investigated by the EEOC.

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Plaintiff to work at his regular duties casing mail despite Dr. Watkins' order that he work on a modified basis, and followed him into the restroom to order him to return to work.

Because Plaintiff's 1995 EEOC complaint and 1996 EEOC request for counseling alleged discrimination based on gender, Plaintiff's claim of gender discrimination, based upon the conduct alleged in those complaints, may be considered by this Court.

II. Race and Gender Discrimination Claims

Defendant argues that Plaintiff has failed to allege with particularity facts demonstrating a nexus between the challenged actions of his supervisors and discrimination on the basis of Plaintiff's race or gender. Therefore, according to Defendant, Plaintiff has failed to comply with the April Order, and has not plead a prima facie case of employment discrimination.

Plaintiff alleges in his FAC that USPS supervisors engaged in numerous discriminatory acts designed to deny him meaningful employment as enjoyed by similarly situated non-African-American employees and by similarly situated women. However, the only allegations that can be considered here are the allegations that Plaintiff asserted in his 1995 and 1996 EEOC complaints.

With respect to these allegations, Plaintiff fails to allege a nexus between his supervisors' conduct and his race or gender. Plaintiff alleges that other employees with medical conditions similar to his were not subjected to the same treatment and that Defendant assigned both female and non-African-American employees duties that were within their medical restrictions, or modified their work assignments when they could not perform their assigned

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duties. However, Plaintiff's complaint does not contain any factual basis for these allegations. Plaintiff does not identify the employees, their injuries, or any specific instance of Defendant's differential treatment. Plaintiff merely asserts that Defendant treated other employees differently.

Although Plaintiff is correct that he is only required to set forth a short and plain statement that adequately gives Defendant fair notice of what his claim is and the grounds on which it rests, conclusory allegations are not sufficient to withstand a motion to dismiss. Because, despite the Court's instruction in the April Order, Plaintiff has failed to allege with particularity in his amended complaint a factual connection between the actions of his supervisors and his race or gender, the Court grants Defendant's motion to dismiss Plaintiff's race and gender discrimination claims with prejudice.

III. Retaliation Claim

Defendant argues that Plaintiff's retaliation claim must be dismissed because he has not plead a prima facie case.

To establish a prima facie case of retaliation, the plaintiff must show that: "(1) he has engaged in statutorily protected expression; (2) he has suffered an adverse employment action; and (3) there is a causal link between the protected expression and the adverse action." EEOC v. Crown Zellerbach, 720 F.2d 1008, 1012 (9th Cir. 1983) (footnote omitted). Causation may be inferred from circumstantial evidence, such as an employer's knowledge that a plaintiff engaged in protected activities and the proximity in time between the protected action and the allegedly retaliatory

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employment decision. See Yartzoff v. Thomas, 809 F.2d 1371, 1376 (9th Cir. 1987). Contact with an EEOC counselor in itself is protected activity. See Hashimoto v. Dalton, 118 F.3d 671, 680 (9th Cir. 1997).

Plaintiff asserts, and Defendant does not dispute, that Plaintiff's filing of the 1992 and 1993 EEOC complaints constitutes protected activity.

In his FAC, Plaintiff alleges numerous retaliatory acts. However, as stated above, the only allegations that can be considered are those that Plaintiff also made in his 1995 and 1996 EEOC complaints, which are: (1) sometime before July 21, 1995, Postmaster August gave Dr. El-Gohary information that influenced him to place Plaintiff back on full duty; (2) on July 21, 1995, Supervisor Spencer ordered Plaintiff to do his regular work duties, refused to reassign him to duties that would accommodate his medical condition, and stated that Plaintiff would have to go home if he could not do his regular duties; (3) on July 21, 1995, Supervisor Spencer failed to advise Plaintiff how to change physicians; (4) on August 26, 1995, Supervisor Spencer wrongly charged Plaintiff with being AWOL when Plaintiff had been following Supervisor Spencer's orders to go home; (5) on August 28, 1995, Postmaster August refused to listen to Plaintiff when Plaintiff tried to explain to him his medical condition, ordered Plaintiff to continue to case mail and stood by staring at Plaintiff while Plaintiff worked; (6) on or about September 12, 1995, Postmaster August refused to reassign Plaintiff to duties that would accommodate his medical condition; and (7) on October 12, 1995,

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Supervisor Pennix told Plaintiff that his doctor's restrictions were not going to be honored.[4]

Defendant argues that Plaintiff fails to allege a causal connection between these alleged adverse employment actions and his prior protected activity.

Citing Mitchell v. Baldrige, 759 F.2d 80 (D.C. Cir. 1985), Plaintiff argues that he has alleged a causal connection between the adverse employment actions and his protected prior activity because the adverse actions occurred after June 22, 1995, the day the OFO remanded Plaintiff's 1992 complaint back to the USPS for investigation, and because prior to the remand of his complaint, on May 25, 1995, Supervisor Spencer had given him a good work evaluation.

In Mitchell, the court found there was a causal connection between the plaintiff's protected activity and the negative performance evaluations that his supervisor gave him immediately after the plaintiff undertook the protected activity. See id. at 86-87. The court based its ruling on the facts that the plaintiff testified that his supervisor was aware that he had filed a grievance and an EEO claim and that this testimony was corroborated by exhibits in the record which showed that his supervisor was contacted when the plaintiff first initiated the grievance proceedings that led to the EEO complaint. See id. at 67.

Unlike the plaintiff in Mitchell, Plaintiff does not

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[4]In his May, 1996 EEOC complaint, Plaintiff alleged that Supervisor Pennix followed him into the bathroom to tell him to return to work. Plaintiff does not reassert this allegation in his FAC.

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specifically allege that the individuals who committed the adverse actions against him had knowledge of the recent developments in his EEO activity such that a causal link could be inferred. Although Plaintiff alleges that the OFO remand letter was dated June 22, 1995, he does not allege to whom the OFO remand letter was addressed nor does he attach it as an exhibit to the FAC. The only exhibit Plaintiff attaches relating to his protected activity is the July 24, 1995 USPS Remand Acceptance Letter addressed to Plaintiff and written by William W. Norris, Acting Appeals Review Examiner/Analyst, located in San Bruno, California. Because this letter was written by a person located in the USPS San Bruno office, it does not support an inference that the OFO letter was addressed to someone in the Alameda office where Plaintiff worked. Therefore, the OFO remand letter fails to provide the causal link between Plaintiff's EEO activity and the adverse employment action.

Plaintiff's conclusory allegations, such as "a communication network exist [sic] whereby postal officials monitor and maintain information concerning employees and especially those employees who file EEO complaints for retaliatory purposes," and "the EEO Investigator is recognized by name or face by all Postmasters and supervisory personnel," are insufficient to establish that the specific individuals who committed the adverse acts knew of the recent developments with respect to Plaintiff's protected activity. Likewise, his allegation that "the supervisor who is in charge of the complaining party is alerted of the nature of the EEO investigators visit as well as to other supervisory [sic] who recognize the EEO staff personnel and procedure" is also

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insufficient to establish a causal link between his protected activity and the adverse actions because Plaintiff does not allege that any such visit took place proximate in time to the alleged retaliation. In their affidavits submitted in response to the investigation of Plaintiff's 1995 and 1996 EEO complaints, Supervisor Spencer, Postmaster August and Supervisor Pennix stated that they were aware that Plaintiff had filed prior EEO complaints. However, they stated that they did not recall when they became aware of this fact. They may have been aware of Plaintiff's EEO activity when he filed his claims in 1992 and 1993, several years before the adverse employment actions took place. Their admissions of general awareness of Plaintiff's past EEO activity does not establish the proximity in time to the retaliatory actions complained of that is necessary to raise an inference of a causal connection.

Because Plaintiff has failed to allege in his FAC a causal link between his protected activity and any adverse employment action, the Court grants Defendant's motion to dismiss Plaintiff's retaliation claim. In the April Order, the Court explained that "an act of retaliation must take place after the alleged retaliator learns of the protected activity being retaliated against." April Order at 18:19-21. Because Plaintiff has failed to allege that the alleged retaliators learned of his protected activity proximately before they took the retaliatory action, Plaintiff's retaliation claim is dismissed with prejudice. Because all of Plaintiff's claims are dismissed, Plaintiff's Rule 56(f) request to continue the motion for summary judgment for further discovery is denied as

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moot.

CONCLUSION

For the reasons stated above, the Court GRANTS Defendant's motion to dismiss (Docket No. 22), and DENIES Plaintiff's Rule 56(f) request for discovery.

Dated: MAR 27 2001

CLAUDIA WILKEN
United States District Judge

Copies mailed to counsel
as noted on the following page

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